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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

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OPINIONS BELOW.

This is an appeal from the final decree (R., p. 49) of a specially constituted three-judge court, dismissing appellant's bill in an action by it to set aside a certificate of public convenience and necessity issued by the Interstate Commerce Commission on August 1, 1930, to the Chesapeake Beach Railway Company.

The opinion of the lower court is reported in 59 W. L. R. 410 (Adv. Sheets, June 19, 1931, No. 25) (R., pp. 44-48). The report, certificate and order of the Interstate Commerce Commission (R., pp. 18-33) are reported in 166 I. C. C. 293.

JURISDICTION.

The decree of the court below was entered on June 17, 1931 (R., p. 49). Petition for appeal was presented to said court and allowed on the same day (R., pp. 49-50). The time for docketing the appeal in this Court was enlarged from time to time to October 17, 1931 (R., p. 54). The appeal was docketed on October 12, 1931.

Jurisdiction of this Court rests on the Urgent Deficiences Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A. Tit. 28, Sec. 47(a) and Sub-sec. 4, Sec. 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. A. Tit. 28, Sec. 345).

QUESTIONS PRESENTED.

The Commission's certificate of public convenience and necessity of August 1, 1930, pretended to authorize the railway company to establish and operate a general ferry service across Chesapeake Bay between two points entirely within the State of Maryland.

The primary question presented is whether or not this certificate is void. Appellant contends that as authority to operate a general ferry, the certificate is void because it is beyond the power of the Interstate Commerce Commission and that it is also void because there was no evidence either before the Commission or court below to support the certificate as authority to extend the railroad line. The special court held that there was sufficient evidence to support the certificate, construing it to be limited to authority to extend the rail line by ferry.

A second question involves the right of appellant, an intervenor before the Interstate Commerce Commission,

to maintain this action. It is appellant's contention in this respect that, if the certificate of the Commission is illegal and void, appellant can maintain the action if it be shown that it will suffer great legal damage, unless the certificate be set aside.

Although this question was urged below by appellees, the special court refused to pass on it, because it dismissed appellant's bill on the merits.

STATUTES INVOLVED.

The following portions of the Interstate Commerce Act, as amended, are primarily involved:

> Sec. 1, Par. 18. "EXTENSION OR ABANDONMENT OF LINES; CERTIFICATE REQUIRED. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."
>
> "Sec. 1, Par. 3. * * * The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad * * *."

STATEMENT.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

This proceeding originated in the Interstate Commerce Commission upon the filing by the appellee, Chesapeake Beach Railway Company, of an application under Paragraphs 18 to 21, inclusive, of Section 1 of the Interstate Commerce Act, as amended, "for a certificate that the present and future public convenience and necessity require and will require an extension of its line by establishing and operating a ferry for the transportation of passengers and property between Chesapeake Beach in Calvert County, Maryland, across Chesapeake Bay and a point on Trippe's Bay in Dorchester County, Maryland" (R., pp. 124 and 126).

Upon a showing by appellant that it had a vital financial interest in the proceeding, it was permitted to intervene before the Commission (R., p. 157).

Thereafter testimony was adduced before an Examiner and the following facts, later to be set out in greater detail, were found to exist:

That the appellee, Chesapeake Beach Railway Company, hereinafter referred to as the Railway Company, was and is a common carrier by rail of freight and passengers, its line extending from a point just within the District of Columbia to a summer resort and amusement park at Chesapeake Beach, Maryland, on the western shore of Chesapeake Bay, a distance of approximately twenty-nine miles (R., p. 18). The railway company was organized in March, 1896, at which time it acquired, through foreclosure proceedings, the property and franchises of the Washington and Chesapeake Beach Railway

Company, a corporation chartered by the State of Maryland in September, 1891, and which became insolvent before completing the construction of the said railway line. Since acquiring the property, the Railway Company has also become insolvent. It is now in default in the payment of principal and interest of $1,000,000.00 of first mortgage bonds which matured July 1, 1923 (R., pp. 18-19). Moreover, it does not appear that any interest on these obligations was ever paid. There are other liens and claims against the property of varying amounts (R., p. 19).

Prior to 1929, operating revenues each year showed a deficit of substantial amounts (R., p. 19). In the year 1929 an operating profit was shown for the first time in the amount of $7,439.59 and this only after maintenance charges had been reduced by over $20,000.00 (R., p. 19). In short, the Railway Company is hopelessly insolvent.

That the intervenor, Claiborne-Annapolis Ferry Company, hereinafter referred to as the Ferry Company, has, for a number of years, operated a ferry service for passengers and vehicles on Chesapeake Bay between the City of Annapolis on the western shore of Maryland and the village of Claiborne on the eastern shore of Maryland (R., p. 11). More recently it has inaugurated a similar ferry service between Annapolis and Kent Island, Maryland (R., p. 112). The history of Maryland ferry companies operating on Chesapeake Bay has been one of financial disaster (R., p. 113). In order to maintain such a service, the State of Maryland paid an annual subsidy to the Ferry Company (R., pp. 111, 114 and 116). After operating for a number of years at a loss, the Ferry Company's business, by reason of the improved facilities employed by it and the increasing traffic between the eastern and western shores of Chesapeake Bay, began to im-

prove and, in the two years just prior to the commencement of this proceeding, showed substantial profits (R., pp. 31, 121-22).

That the so-called Eastern Shore of Maryland is a part of what is known as the Del-Mar-Va peninsula (R., p. 20), being separated from the mainland by the waters of Chesapeake Bay and connected with it at the northern end of the Bay. In order to travel by motor from the eastern to the western shore, it is necessary to proceed north to the northern end of the peninsula where it connects with the mainland and then to return southward to the western shore (see Map, Exhibit 3, R., p. 144-B), unless the journey from shore to shore is made by ferry over the waters of Chesapeake Bay. At the present time the Claiborne-Annapolis ferry is the one most convenient for use in reaching a large part of the peninsula, although there are other ferries from Baltimore to Tolchester, and from Baltimore to Love Point, etc. (R., p. 113).

With the development of improved highways on the Del-Mar-Va peninsula, motor traffic to and from the Eastern Shore has increased materially. This traffic consists principally of persons travelling in passenger motor vehicles from one shore to another, of motorists from more distant points on the mainland to various resorts on the Eastern Shore, of motor trucks carrying the produce of the Eastern Shore to the markets at Washington and Baltimore and also motor vehicles transporting various commodities from those centers to the Eastern Shore (R., pp. 26-28).

About two years prior to the filing of the present application, a movement was begun by residents of Cambridge, Maryland, a city on the Eastern Shore approximately

47.5 miles south of Claiborne, Maryland, the eastern terminus of the intervenor's ferry, to establish a ferry to operate from a point on Trippe's Bay on the eastern shore to Chesapeake Beach on the western shore of Maryland. It was believed by the advocates of this new ferry that it would add greatly to the convenience and increase the volume of traffic of persons travelling by motor vehicles between points on the Eastern Shore south of Cambridge and points on the Western Shore and beyond. Due, however, to the lack of necessary financial support, the project and the corporation organized to carry it into effect, were abandoned by its original proponents (R., p. 29).

Subsequently, the promoters of the project interested the Railway Company in it and the latter thereupon filed the present application with the Commission for a certificate permitting an "extension of its line" by ferry between the points mentioned (R., p. 29), at the same time seeking authority to sell $1,275,000.00 of new securities for that purpose (R., p. 20).

That for passenger motor vehicles and motor trucks travelling between the Western Shore and Eastern Shore of Maryland south of Cambridge it was shown that the inauguration of such a new ferry service might be a matter of convenience. It was nowhere shown, as will later be set out in greater detail, that the operation of such a ferry in connection with the rail line of the Chesapeake Beach Railway Company, that is as an "extension of its line," was or would be necessary or convenient to anyone. In other words, the only "public necessity or convenience," if any, to be served by the establishment of the proposed ferry was for motorists travelling from one shore to the other in passenger cars or trucks, under

their own power and whose transportation had not the remotest connection with the rail line of the applicant company.

Upon the foregoing facts the Examiner found that the public convenience and necessity required, or would require, the establishment of the proposed ferry and recommended the issuance by the Commission of a certificate to that effect.

Thereupon, the Ferry Company filed exceptions to the Examiner's report in which it was contended, among other things, that the Commission, upon the above showing, was not authorized by law to issue a certificate of public convenience and necessity for the establishment of a general ferry service between two points wholly within the State of Maryland, where the only public necessity or convenience, if any, involved was wholly unconnected with the operation of said ferry as an extension of the applicant's rail line.

Thereafter the matter was submitted to the Commission on the Examiner's report and intervenor's exceptions thereto and on August 1, 1930, the Commission made its report and order here in controversy (R., pp. 18-33).

The Commission found:

> "Upon the facts presented, we find that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of a ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Maryland, as set forth in the application" (R., p. 32).

It thereupon, on the same day, issued its certificate of public convenience and necessity (R., p. 32) authorizing the establishment and operation of the ferry.

Thereafter, the Ferry Company filed its petition for a modification of the Commission's certificate (R., p. 169) upon the ground that the same did not make it clear whether the Chesapeake Beach Railway Company was authorized to establish a railway ferry, that is, a ferry to be "used by or in connection with" its railroad, or whether it was authorized to establish and operate both a railroad ferry and a general or vehicular ferry. This petition for modification was denied by the Commission on October 13, 1930 (R., p. 177).

Thereafter, on October 14, 1930, the Public Service Commission of Maryland, on behalf of the State of Maryland, addressed a letter to the Interstate Commerce Commission (R., p. 178) in which it stated that, whereas the State of Maryland had no objection to an order of the Commission authorizing the Railway Company to operate a ferry to be "used by or in connection with its railroad," i. e., as an extension of its railway line, nevertheless, it did, on behalf of the State of Maryland, object to any order authorizing the establishment of a general ferry to operate entirely within the State of Maryland and not operating as an extension of said railway line. No action upon this protest was taken by the Commission and the certificate of August 1, 1930, continued and still continues in effect.

PROCEEDINGS IN THE COURT BELOW.

Suit to enjoin, cancel and annul the Commission's certificate and order of August 1, 1930, was filed by the Ferry Company against the United States, the Interstate Commerce Commission and the Railway Company

in the Supreme Court of the District of Columbia on December 24, 1930. The petition (R., pp. 1-7) alleged the invalidity and illegality of the certificate and order of August 1, 1930, upon the following grounds, among others:

1. That the Commission's only authority to issue its certificate in the instant case was upon a showing that public convenience and necessity required or would require the establishment and operation of a ferry to be "used by or in connection with the railway line" of the Railway Company and that there was no evidence, or no substantial evidence, showing any such convenience or necessity to be served.

2. That a finding of public convenience and necessity for the establishment of a general or vehicular ferry to operate between two points wholly within the State of Maryland and having, in such use, no connection with the railway line of the Railway Company was insufficient to authorize the issuance of the certificate and order complained of.

3. That the order and certificate were, therefore, illegal and void for the foregoing reasons and that the same should be cancelled and set aside.

4. That unless the said order and certificate were cancelled and set aside, the Ferry Company would suffer great and irreparable legal damage.

Answers were filed by all defendants (R., pp. 7-12; 13-17; 34-38). Each answer separately set up the following defenses:

1. That the Supreme Court of the District of Columbia was not a District Court of the United States within the purview of the District Court Act (38 Stat. 220).

2. That the three-judge court must include at least one Circuit Judge and that a Judge of the Court of the Appeals of the District of Columbia was not such a judge within the language of the Act.

3. That appellant could not "institute" this suit under the language of the jurisdictional statutes involved.

4. That the evidence before the Commission was substantial and sufficient to support its findings and certificate.

A three-judge court, consisting of two Justices of the Supreme Court of the District of Columbia and a Justice of the Court of Appeals of the District of Columbia was thereupon convened (R., p. 43) and a hearing held before said court on May 18, 1931 (R., p. 43). At said hearing there were introduced in evidence all of the proceedings, including the testimony taken, before the interstate Commerce Commission.

Following the hearing, the special court rendered its opinion on June 6, 1931 (R., pp. 44-48). It held:

1. That the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia were, respectively, a District Court and a Circuit Court of Appeals within the meaning of the District Court Act.

2. It refused to pass upon the question of the right of appellant to maintain the action because it was of the opinion that the Commission's order was valid and should not be set aside.

3. It refused to determine whether or not the Commisson's certificate authorized the Railway Company to conduct a general ferry business separate and distinct from its railway business and further refused to deter-

mine whether said certificate, if such was its effect, was in that respect invalid.

4. It determined that the Commission's certificate granted to the Railway Company the privilege of extending its rail line by ferry to the Eastern Shore of Maryland and that the evidence sufficiently supported the finding upon which it was based.

Thereupon, on June 17, 1931, the Court entered its final decree (R., p. 49) dismissing appellant's bill from which decree this appeal is now taken (R., pp. 49-50).

SPECIFICATIONS OF ERRORS TO BE URGED.

The following errors of the lower court are urged herein (R., pp. 51-52):

1. In finding that there was substantial evidence to support the Commission's certificate.
2. In not finding that the certificate was beyond the Commission's power to issue.
3. In not holding said certificate to be null and void because there was no evidence or substantial evidence to support it.
4. In not finding that the railroad has no authority under its charter to operate the service authorized by the certificate.
5. In not finding that appellant could maintain this action.
6. In dismissing appellant's bill.

SUMMARY OF ARGUMENT.

Appellant's general position on this appeal is as follows:

That the Commission was without authority to issue its certificate in the instant case unless it appeared that there was a public need for the establishment and operation of a ferry to be "used by or operated in connection with" the railway company's existing railway line, that is, as an extension of its line. That the only public need, if any, for a ferry disclosed by the record was for a general or vehicular ferry having, as such, no use by or operation in connection with the Railway Company's line. That the record contains no evidence whatsoever that public convenience or necessity require or will require the extension of the Railway Company's line by ferry and that a showing of public necessity for a general ferry was insufficient to support the Commission's certificate.

It is appellant's further position that, the certificate being void and it being about to suffer great legal damage unless the same be set aside, it is entitled to maintain this action.

The argument in support of the foregoing general position may now be briefly stated and later hereinafter elaborated in the following order:

1. The certificate of August 1, 1930, could be lawfully issued only upon a showing that public convenience and necessity required or would require the establishment and operation of a ferry as an extension of the rail line, that is, a ferry to be "used by or operated in connection with" said rail line.

2. That, unless a showing of such convenience and necessity were made, the existence of a public need for a general ferry was not sufficient to authorize the certificate.

3. There was no substantial evidence and, in fact, no evidence whatsoever, showing any necessity for the establishment and operation of a railroad ferry.

4. Where there is no evidence or no substantial evidence to support a necessary finding, the certificate based on such a finding is void.

5. The railroad has no authority, under its charter, to engage in a general ferry business.

6. That unless the certificate is cancelled and set aside, appellant will suffer great legal damage.

7. That, where it appears that appellant will suffer great legal damage unless the void certificate is set aside, it is entitled to institute and maintain an action to set the same aside.

ARGUMENT.

I.

THE CERTIFICATE COULD BE LAWFULLY ISSUED ONLY UPON A SHOWING THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRED OR WOULD REQUIRE THE ESTABLISHMENT AND OPERATION OF THE FERRY AS A RAILROAD FERRY OR EXTENSION OF THE RAILWAY LINE, THAT IS, A FERRY TO BE "USED BY OR OPERATED IN CONNECTION WITH" THE RAIL LINE.

Section 1, Paragraph 18, of the Transportation Act, provides, in part, that

> "No carrier * * * shall undertake the extension of its line of railroad, * * * unless and until there shall first have been obtained from the Commission

> a certificate that the present or future public convenience and necessity require, or will require the construction, or operation, or construction and operation, of such * * * extended line of railroad."

Section 1, Paragraph 3, provides, so far as is here material, that

> "The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad. * * *"

> "Public convenience or necessity, as used in the quoted statute, has been defined to mean a 'strong or urgent public need'." *Application of Utah Terminal Ry.*, 72 I. C. C. 89, 92.

Restating Paragraph 18 in the light of the definitions prescribed above, Paragraph 18 provides, in substance, that

> No carrier * * * shall undertake the extension of its line by a ferry unless and until there shall first have been obtained from the Commission a certificate that there is an urgent public need for the construction or operation, or construction and operation, of a ferry to be used by or operated in connection with said railroad.

This is the only provision of law under which the Commission was authorized, if at all, to issue the certificate here in controversy.

It will be necessary, initially, to consider briefly the rather obvious significance of the phrase "ferry used by or operated in connection with" a railroad.

> " 'A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travellers with their teams and vehicles and

other property as they may carry or have them' * * *. It, * * * growing out of public necessity and the public interest in its operation, is subject to local control." *St. Clair Co. v. Interstate Transfer Company*, 192 U. S. 454, 466-467.

A ferry, therefore, broadly speaking, is a part of the public highway, spanning a gap of water and is subject generally to local control.

The case just cited was an action by a County in the State of Illinois to recover certain statutory penalties alleged to have been incurred by the appellee in operating a ferry for transporting its railroad cars over the Mississippi River from St. Clair County, Illinois, to a point on the Missouri shore, without first having obtained from the County a license prescribed by statute for operating a ferry.

The Court held that, whereas, a general ferry for the transportation of persons and vehicles was a part of the local highway system and subject to local regulation and control, nevertheless, where a ferry was used solely for the transportation of railroad cars in bridging the river and thus in carrying on an interstate journey, any effort to tax such a ferry was a prohibited burden on interstate commerce.

Said this Court, quoting from *Mayor of New York v. New England Transfer Co.*, 14 Blach. 159, 167:

> "The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with

two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

"Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals, and freight, at intervals more or less regular, for fare or toll." (p. 468).

In *Golden Gate Ferry Company v. Railroad Commission*, 204 Cal. 305, it appeared that the Southern Pacific Railroad had been operating ferries across San Francisco Bay in connection with its railroad lines. It changed the style of its boats so as to fit them for carrying vehicular traffic, and undertook to engage in a general ferry business without first obtaining a certificate from the State Railroad Commission. The Railroad Commission found that the railroad was exempted by the California Public Utilities Act from the necessity of securing a certificate for the operation of either the ferry service in connection with its railroad or its vehicular ferry service. The Supreme Court of California, however, overruled the Commission, holding that the two services were distinct and that a general ferry service, not being a service incident to the operation of the railroad, the rail-

road had no authority to operate such a service without first obtaining from the State Railroad Commission a certificate to do so.

The Court said:

"An examination of the entire act under consideration evinces a determined purpose to give to the Railroad Commission power to regulate transportation on the inland waters of the state by granting or refusing certificates of public convenience and necessity, and a construction of the act, such as contended for by respondents, so as to exempt any person or corporation from applying for such certificate if he or it has been operating any type of vessel in any type of service before the act became operative, would leave with the Railroad Commission but a semblance of power, and to construe the act so as to exempt a corporation from securing a certificate to carry freight if it had previously carried freight over a different route, but one comparable in some of its features to the new route sought, would be to give an elasticity to the language and the action to be taken under it which would result in confusion and litigation and impotency on the part of the Commission. The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to us to be to construe the language, 'operating vessels in good faith,' to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the act. It seems apparent from the admitted facts that the Southern Pacific Company was not operating such a service at the date mentioned. A different type of vessel is to be used by the Southern Pacific Company from that used at the date of the Act; a different route is to be taken, and a different class of service rendered. * * *

"* * * At the time of the tariff amendment the Southern Pacific Company was engaged in the operation of vessels between Alameda pier and the Ferry

Building in San Francisco for the transportation only of passengers transported over its railroad. It had no tariff on file for the transportation of any freight of any kind whatever. *The operation of a vehicular ferry has no connection with the operation of a railroad service. It is in no way an adjunct of the railroad operation. A vehicular service could just as well be rendered by a corporation which had no rights whatever to operate a railroad.* The Southern Pacific Company, in another action, successfully maintained this contention before this court. (Southern Pacific Company v. Richardson, 181 Cal. 280; 184 Pac. 3)." (Italics ours.)

In the same case, a separate opinion was delivered by Preston, Judge, who, concurring in the result reached by the Court, said in part:

"If it be borne in mind that the Southern Pacific Company is seeking to engraft upon its railroad service, controlled by a foreign charter and over which the Railroad Commission has but limited control, a service that can be lawfully exercised only under local franchise grants, the intention of the legislature is easily discerned. The general terms employed in the statute must give way for the operation of the legislative intent (People v. Ventura Refining Company, *ante*, p. 286 ((268 Pac. 347))). *A local ferry operation is in no proper sense a railway operation as it may and usually does exist independent of it.* The carriage by water to bridge the gap between the interrupted termini is but an incident to the railway transportation, a projection of its road over intervening waters. Such ferriage is merged into the railway transportation and is no proper sense an entity or process resting upon its own independent foundation as is the case in commerce upon the inland waters, whether by ferry or other craft. This was the holding of this court in the case of Southern Pacific Company vs. Richardson, 181

Cal. 280 (184 Pac. 3), respecting the creek route ferry itself.

"Indeed, in Wheeler v. S. F. & A. R. Co., 31 Cal. 46, 64 (89 Am. Dec. 147), speaking of this identical subject, Justice Sawyer said: 'It is one thing to build and own a line of steamers to some foreign country, or some distant port, carrying on a wholly distinct and independent business entirely foreign to the objects of a railroad corporation, which might just as well, and a great deal better, be transacted by some other company organized for the purpose; and quite another, to own and control a steamboat for crossing rivers and bays which lay in the line of the road, and the use of which is convenient, proper and necessary to a successful accomplishment of the objects for which the road is built and operated.' This statement would be equally true if it had inserted therein the words 'port,' or 'or between local ports or points.' See, also, Wheeler v. S. F. & A. R. Co., *supra*. This distinction between these two classes of service has been recognized many times in other jurisdictions." (Italics ours.)

See also *Fitch v. New Haven, New London and Stonington Railway Company*, 30 Conn. 38; *The Maverick*, 16 Fed. Cas. (No. 9316) 1186; *Chesapeake Ferry Co. v. Hampton Roads Transportation Co.*, 133 S. E. (Va.) 561.

Sufficient has been said above, it is believed, to make plain the distinction between a general ferry, which is a link in the local public highways, and a railroad ferry, which is merely a moving bridge to enable a railroad to begin, continue or complete a travel over its rails.

The present uses of a railroad ferry may be somewhat more diversified than was the case thirty years ago. They may now include (1) the lightering of a railroad's passenger and freight cars, either empty or loaded, across a body of water to resume a rail journey on the other

side, (2) similar lighterage from a rail terminus to a more convenient unloading point, or (3) assembly of freight and passengers from a point of departure to the rail head, the latter two illustrations being typical examples of a railroad ferry service such as that maintained at the Baltimore and Ohio Railroad's New York City terminal.

In all such cases, however, the ferry is employed as an integral part of a journey by rail and merely serves as a link in such rail journey.

In the light of what has been said, it seems entirely obvious that a ferry to be "used by or operated in connection with" a railroad has certain very definite and easily ascertained characteristics both to the lay and legal mind. It is a ferry serving as a moving bridge for a railroad to enable it to begin, continue or complete the rail transportation of its freight and passengers. Such a ferry will, for purposes of brevity, be hereinafter referred to as a "railroad ferry."

From the foregoing, it seems plain that the effect of Paragraph 18, Sec. 1, of the Transportation Act is that the Interstate Commerce Commission was authorized, in the case at bar, to issue its certificate if, *and only if*, there was shown to be "an urgent public need for the construction or operation or construction and operation of a railroad ferry."

II.

THAT UNLESS THERE WAS A SHOWING OF URGENT PUBLIC NEED FOR A RAILROAD FERRY, THE EXISTENCE OF A PUBLIC NEED FOR A GENERAL FERRY WAS NOT SUFFICIENT TO AUTHORIZE THE CERTIFICATE.

From what has been said above, it seems clear that the only statutory basis upon which the Commission was authorized, in the case at bar, to issue its certificate was

upon a showing that there was an urgent need for the establishment of a railroad ferry.

Testimony that a need existed for a general ferry, in the absence of any showing of a need for a railroad ferry, is clearly insufficient under the statute to authorize the issuance of the certificate for reasons already discussed.

It is submitted that the Congress has no power under the Constitution to provide for a certificate based upon a need for a general ferry operating entirely within a single state, but that question need not be argued at length because the Congress has not attempted to exercise any such power. The Interstate Commerce Commission of course can not arrogate such authority unto itself.

> "They (inspection laws) form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently they remain subject to state legislation."
>
> Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1.

And see:

St. Clair County v. Interstate Transfer Co., supra.

Port Richmond and Ferry Co. v. Hudson Co., 234 U. S. 317, 58 L. Ed. 1330.

Wilmington Transport Co. v. Cal. R. R. Com., 236 U. S. 151, 59 L. Ed. 508.

Larson v. South Dakota, 278 U. S. 429, 73 L. Ed. 441.

In the State of Maryland, authority over ferries within the State has been conferred by the legislature upon the Public Service Commission of Maryland, by the provisions of Chapter 180 of the Acts of the General Assembly of 1910.

Bay Bridge Ferry Corp. v. Queen Anne's County, 160 Md. 398.

Section 1, Par. 2,* of the Transportation Act provides that it shall not apply to the transportation of passengers and property wholly within one State. The Interstate Commerce Commission, in its reports, after reviewings the testimony bearing on the usefulness of a *general ferry,* noticed the contention of the appellant that the Commission was not authorized by law to issue a certificate of public convenience and necessity for the establishment of a general ferry service from point to point within a State. The Commission, however, decided that upon the facts disclosed in the record, "we are of the opinion that we have jurisdiction in premises." And so the Commission granted authority for the construction of two ferry boats designed to carry 95 motor vehicles, a service without any relationship to the railroad business. And thus did it waive aside the Constitution of the United States, and the express limitation of power contained in the Transportation Act. We submit that the order is void on its face as beyond the authority of the Commission.

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* Par. 2 provides:

"The provisions of this chapter shall also apply to such transportation of passengers and property * * * but shall not apply—

(a) To the transportation of passengers and property, or to the receiving, delivery, storage, or handling of property, wholly within one State * * *."

This provision is, of course, merely a legislative recognition of the lack of constitutional power in the Congress to regulate intrastate commerce.

III.

THERE WAS NO EVIDENCE SHOWING ANY NEED FOR A RAILROAD FERRY.

From what has already been said, it is apparent that the certificate was without legal support unless there was a showing of a "strong and urgent need" for a railroad ferry.

It is, therefore, necessary to consider the evidence before the Commission and the court below on this point.

The Railroad's entire case before the Commission was built around existence of a need for a general ferry. The testimony was directed to a showing that motor traffic to and from the Eastern Shore by passenger vehicles and trucks was increasing rapidly; that the facilities of the Claiborne-Annapolis Ferry were at times inconvenient for a portion of this traffic originating at or bound for points south of Claiborne; that, upon estimates submitted of anticipated revenue from motor vehicles and passengers therein (R., pp. 23-25, and Ex. 7, p. 147), the proposed ferry would be able to earn substantial profits in furnishing an additional general ferry service. It will not be necessary to go into any elaborate discussion of the evidence touching on the need for a general ferry because this need may, for present purposes, be assumed.

Suffice it to quote from the Commission's report that the primary purpose of the new ferry was to

> "Evolve a system of transportation for expeditious handling of motor vehicles and persons travelling by motor vehicles in new routes shorter than now available between points on the lower Eastern Shore and points on the mainland" (R., p. 22).

The Commission's report then states that the traffic expected to use the proposed ferry may be grouped, by classes, as follows (R., p. 22):

"1. Private automobiles and motor busses transporting (a) tourist visitors and residents of the National Capital to and from Ocean City and other points on the Eastern Shore, (b) Eastern Shore patrons of an amusement park being developed at Chesapeake Beach by the Chesapeake Beach Hotel Company, and (c) persons traveling from one shore of the bay to the other in ordinary commercial and social communications.

"2. Motor trucks transporting fresh vegetables and fruits and seafood products from points of origin on the Eastern Shore to markets at Washington, and possibly Baltimore.

"3. Motor trucks used by west-shore jobbers in distributing various commodities to dealers on the Eastern Shore.

"4. Persons, in addition to the drivers, occupying passenger vehicles listed above, *persons traveling on through tickets between Chesapeake Junction and a station proposed to be established on the Eastern Shore at or near Hudson,* and west-shore visitors to the amusement park who may be attracted by a voyage on the waters of the bay.

"5. *Package freight moving from points in C. F. A.* or trunk-line territory to the station at Hudson."

It will be noted that, of the various classes of traffic intended to be served by the proposed ferry, all save two, presently to be discussed, consist of motor vehicles (together with persons therein) moving entirely independent of any rail line, traveling under their own power

over land and employing the ferry only as the means of continuing a motor journey interrupted by water. Only two classes of the traffic enumerated relate in any way to the proposed ferry in its "use by or operation in connection with" the railroad. These two classes are:

(1) Persons traveling on through tickets between Chesapeake Junction and a station proposed to be established on the Eastern Shore at or near Hudson, and

(2) Package freight moving from points in C. F. A. or trunk-line territory to the station at Hudson.

As to the need of a railroad ferry for these two types of traffic the Commission's report contained the following and *only* the following statements:

> "No estimate has been furnished as to package freight. The applicant expects the operation of the ferry would tend to increase the traffic over its railroad."

The remainder of its rather lengthy report is devoted to a discussion of the uses and necessity for a *general ferry.*

Bearing in mind, therefore, that the certificate is without legal basis unless there was evidence showing an urgent public need for a ferry to be used either (a) by through passengers between Chesapeake Junction and Hudson, or (b) for through package freight handled over the railway company's rail line, it is now proposed to examine in detail the evidence on these two points.

(a) *Through passenger traffic from Chesapeake Junction to Hudson.*

There is now set out *all* of the evidence bearing on the use or necessity for a railroad ferry in connection with the transportation of passengers between Chesapeake Junction, D. C., and Hudson.

From the testimony of the witness, Fox:

"Q. I want you to tell in your own way, Mr. Fox, the circumstances surrounding this application.

A. The proposed ferry is intended primarily for the transportation of passengers and motor vehicles and package freight" (R., p. 61).

* * * * * *

"Mr. Fox, will this proposed ferry be equipped to handle passengers from Chesapeake Junction to the Eastern Shore of Maryland?

A. Yes, sir. We propose to establish a station at the eastern terminus of the ferry, possibly the town of Hudson, there being such a village at the ferry landing or close to it. As a matter of fact right at the junction of the property at which the ferry will land, and the state highway, there is a town called Hudson and a post office. I believe the name of the post office is Thomas. It will be our purpose *to handle or to sell* tickets from Chesapeake Junction, D. C., to Hudson, Maryland, which will be the eastern terminus of our ferry.

Q. Those will be through passenger tickets?

A. Yes, sir.

Q. Operating over your line to Chesapeake Beach and the ferry line beyond?

A. Yes, sir.

Q. Do you now hold yourselves out in your tariffs to carry passengers from Chesapeake Junction, D. C., to Chesapeake Beach, Maryland?

A. Yes, sir. Our regular trains are scheduled to and from Chesapeake Junction to Chesapeake Beach,

the eastern terminus of the railroad. This ferry will be equipped to transport loaded passenger busses across the Bay. *If a passenger bus route were to be established from Washington, D. C., to Ocean City, Maryland, this ferry would be capable of handling that bus across the Bay, all sorts of vehicular traffic*" (R., pp. 67-68). (Italics ours.)

* * * * * *

"Q. Mr. Fox, this sub-exhibit No. 11 indicates increases from year to year and increases over the amounts shown in Exhibit No. 6 in freight and passenger revenues. Is that based, in part, on the assumption of increased business to be derived from the operation of the ferry?

A. I think I stated that the net earnings for 1929 of $7,439.59 were extended at the same ratio in 1931.

Q. What I intended to develop was whether you expected increased traffic on the railroad as the result of the operation of the ferry?

A. Yes, we do.

Q. In other words, you will not only handle vehicular traffic but you will handle passenger traffic from Washington, D. C.?

A. Yes. The increase to the railroad will come from passenger traffic using the ferry and the railroad" (R., pp. 69-70).

The foregoing constitutes every word of evidence in the record in support of a need for a railroad ferry in carrying through passenger traffic. There is not a word of testimony to show the class of travelers who need or would even use this through line of rail and ferry travel, no intimation of the number of such passengers who might be expecfed to employ it or any other fact showing the slightest "public necessity or convenience" to be served. The substance of the testimony is only that the

Railway would "handle or sell" through passenger tickets to any person who might offer to buy one. This so-called through passenger traffic is obviously merely a passing thought in the record because "the proposed ferry is intended primarily for the transportation of passenger and motor vehicles and package freight."

It is simply inconceivable that any reasonable person could say, upon this showing, that there was a "strong and urgent need" for a ferry to accommodate persons desiring to travel from Chesapeake Junction to Hudson over the company's rail line.

But if this alleged affirmative showing of necessity or convenience falls short of substance, the other facts in the record bearing on the same matter make the claim utterly ridiculous.

The record shows, in the first place, that for the last five years prior to 1930 the railway's passenger traffic has been steadily declining, due principally to an increasing use of motor vehicles over newly improved roads (Commission's Report, R., p. 19). Chesapeake Junction referred to is the northern terminus of appellee's railway line and is located on the District of Columbia-Maryland line (Ex. 2, p. 144-a). The so-called station "Hudson" is to be situated near the village of Hudson, the post office of which is "Thomas, Maryland," located at the junction of the state highway and the property on which the ferry will land (R., pp. 67-68). It is not stated how far the actual landing point is located from the highway, the exact point of landing being described in the record only as "a point on Trippe's Bay" (See, however, Ex. 15, p. 156-a.)

With these facts in mind it will be interesting to visualize the through passenger traffic that would accrue to the railway company if the proposed ferry were established. A person in the City of Washington desirous of going to the Eastern Shore via the new ferry would find that he would first be compelled to proceed to the District line (which is five miles from the center of the city) by street car, bus, taxi or on foot. He would then disembark at Chesapeake Junction, board appellee's train and proceed thereon for twenty-nine miles to Chesapeake Beach. There he would leave the train and proceed a distance of 2,200 feet or slightly over four-tenths of a mile (R., p. 107, and Ex. 16, p. 156-b) over a wharf to the ferry slip in order to enter the ferry. He would then be transported across Chesapeake Bay and discharged at a "point on Trippe's Bay" on the Eastern Shore. Just what he would do thereafter is left to conjecture. A charitable inference would be that ultimately a bus line might be established to operate between this "point on Trippe's Bay" and some more hospitable location on the Eastern Shore. The record, however, fails to disclose the end of the traveler's journey.

It is difficult to conceive of any person voluntarily taking such a journey. Certainly it would be sufficiently onerous completely to rebut the suggestion that there is a "strong and urgent public need" for such a service. As a matter of fact, the record is quite plain that, if the proposed ferry is established, a bus line will operate from Washington to points on the Eastern Shore via the new ferry (R., p. 68), and no one would ever employ the alleged convenience of a through trip on the railway. Not a single witness testified that it would be convenient or necessary to take such a trip, and the Railroad made no tangible claims that it had or would have patrons for any such service.

It is, therefore, submitted that there is not a scintilla of evidence to show a public need for the proposed ferry in connection with through passenger traffic to the Eastern Shore, and that any such contention falls little short of ridiculous.

(b) *Package freight to Hudson.*

The following is *all* of the evidence bearing on the use or necessity for a railroad ferry in connection with the handling of package freight from points on the mainland to Hudson.

From the testimony of the witness, Fox:

"Q. Would this ferry be equipped to handle merchandise, package freight, from any destination in Official Territory to Maryland destinations?

A. It is our purpose to handle package freight on the ferry from any point in C. F. A. or Trunk-Line territory to Hudson Station, where we will have a freight station in connection with our mole" (R., p. 68).

* * * * * *

"Q. In other words, you will not only handle vehicular traffic but you will handle passenger traffic from Washington, D. C.?

A. Yes. The increase of the railroad will come from passenger traffic using the ferry and the railroad.

Q. And also freight traffic?

A. And package freight traffic" (R., p. 70).

* * * * * *

Redirect Examination:

"Mr. Ames: In response to the Examiner's questions in respect to the possibility of adducing evidence in reply to questions 18 and 19 of the ques-

tionnaire, we desire to state that it is not our plan at present to handle carload freight traffic. We deem those questions particularly applicable to carload business and for that reason in our reply to the questionnaire we have indicated that they are not applicable to our operation. We do expect, however, to handle some merchandise or package freight moving in interstate commerce.

Examiner Molster: Do you expect to show the sources of the probable movement of the package freight?

Mr. Ames: Anything that we might show in that respect, your Honor, would be the barest kind of a guess. I have in mind one particular kind of package freight which will very likely move from Washington, and that is ice cream. As to other possible sources of freight, as I say, it would be the barest kind of a guess because we do not propose to operate until 1931. We cannot very well solicit on that basis, but the world is open to us on package freight. You have wholesale houses in Baltimore and in Washington, jobbers, if you please, who move package freight in considerable quantities to the Eastern Shore of Maryland. We shall certainly endeavor to our utmost to get that business for this ferry or at least a fair share of it, but I do not know that I could introduce any witness that would testify positively on just what we expect to get.

Examiner Molster: I think, if you will pardon the interruption, there is something in the testimony or else in the return to the questionnaire concerning the probable movement of perishables and seed products to Washington.

The Witness (Mr. Fox): That was intended, if I may say, Mr. Examiner, in response to the truck traffic moving to and from those points.

Examiner Molster: Rather than traffic of the railroad?

Witness: Rather than traffic, carload freight.

Mr. Ames: We expect to put on a produce man from Washington here who will testify about the possibility of the service. We will probably have other people who can testify as to the freight possibilities as well as the passenger possibilities" (R., pp. 81-82).*

Recross-examination:

"Q. I understand, Mr. Fox, that you are making no special claim as to the source of merchandise that you expect to carry?

A. No. It is all proposed. We will have a freight station at our other terminal as we have at the western shore terminal and we expect to handle some package freight business.

Q. I understood either you or counsel to say that what you had particularly in mind was business from Washington to the Eastern Shore or vice versa.

Mr. Ames: I do not think any such statement as that was made.

Mr. Perlman: I think, Mr. Ames said—(Mr. Ames interposing) I said that was incidental" (R., pp. 85-86).

It seems necessary to comment only briefly upon this testimony. Most of it is not "testimony" at all, but merely contributions to the record by counsel (Mr. Ames). There is no showing whatsoever of any public need for a rail-ferry route for package freight and indeed the record is quite clear that shipments of this sort are handled by motor truck service. The only definite contention made is that "the world is open" to the Railway on this type of traffic and that it hopes to secure some of it.

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* No such witnesses were produced.

It will be interesting, therefore, to learn from the record just how much of the "world" is actually open to this carrier, operating, as it would, in competition with motor trucks. Appellant has, for many years, had available to the public a service identical with the proposed one. Its ferry terminal at Annapolis immediately adjoins and connects with the Annapolis terminal of the Washington, Baltimore and Annapolis Railroad Company (R., p. 120), which thus connects the ferry with both Baltimore and Washington, whereas the proposed ferry would have a rail connection only with Washington.

The gross freight revenues of the Claiborne-Annapolis Ferry Company for the eight years immediately preceding the commencement of this case before the Commission were, respectively, as follows (R., pp. 31, 185):

1922	$812.84
1923	112.59
1924	Nothing
1925	190.42
1926	318.79
1927	201.38
1928	Nothing
1929	Nothing

It must be apparent, therefore, that not only has the Railway no package freight business in view but that there is actually none for it to secure. To assert, upon this record, that there is a "strong and urgent public need" for a new ferry to handle through package freight seems absolutely preposterous.

Hence, it is submitted, there was no evidence to show any public need for a ferry for that purpose. On the contrary, the evidence shows *affirmatively* that there is no need at all.

* * * * * *

The railroad estimated that during the first year of ferry operation, the operating expenses of the ferry would be $103,567 (R., p. 25). It is interesting to note that this same estimate is made for the succeeding four years (R., p. 25), although during that time the operating revenues are supposed to increase by almost 50% (from $365,000 to $533,082) (R., p. 25). The railroad also estimated fixed charges of $129,000, and taxes and insurance of $15,000, making a grand total of expenses and charges for the first year of $247,567 (R., p. 25), excluding any allowance for depreciation, obsolescence or any contingencies, and also excluding any allowance for interest on $600,000 of second mortgage bonds.

If the order of the Interstate Commerce Commission is to be construed merely as authority to operate a railroad ferry, then where is the revenue to meet these expenses and charges to come from? The Commission accepted the railroad's estimates of these expenses and charges, but apparently the learned court below overlooked the fact that if the certificate is limited to authority to extend the railroad, there is no testimony to support such a certificate. The record fails to disclose a single estimate of ferry revenue, passenger or package freight, to be derived from the extension of the railroad service across the Bay; and it affirmatively appears that no revenue from that source sufficient to support the operation is probable or even possible.

The attention of this Court is directed to the fact that the witnesses promised by the railroad's attorney to testify "to the freight possibilities as well as the passenger possibilities," were never produced. The record, therefore, is silent as to the sources and character of the freight which the railroad pretends will be shipped by railroad and ferry, except as to the lone suggestion of

ice cream—not testified to, but interjected by the railroad's ingenious counsel. And, as pointed out, the record is silent as to the source and number of passengers expected to travel by railroad and ferry, from one end of the line to the other. It is interesting to note that, in giving estimates of ferry revenue, the railroad drops all pretense that these estimated receipts have any relationship to the railroad, and all the ferry estimates are based solely on anticipated revenue from the ferriage of automobiles and trucks, and passengers of such automobiles and trucks.

The witnesses called by the railroad to testify as to public convenience and necessity confined their statements to the desirability of a ferry service for motor vehicles and the passengers of the motor vehicles. No such witness mentioned the railroad, or the railroad facilities. No such witness testified that the ferry was needed by or in connection with the railroad or railroad business. See testimony of the witness Purnell (R., p. 87); Matthews (R., p. 89); Henry (R., p. 89); Gray (R., p. 90); Hearn (R., p. 91); Gignilliat (R., p. 92); Robbins (R., p. 97); Morris (R., p. 100); Smith (R., p. 100); Hyde (R., p. 101); Hayghe (R., p. 103).

In giving the proposed schedule of ferry operation, the railroad made no claim that the schedule had any relationship to the railroad operation (R., p. 65). The record is also silent as to whether it would ever be possible to make a continuous journey by rail and water. In this respect, therefore, the proposed service fails to meet the test applied in *St. Clair Co. v. Interstate Transfer Company, supra,* and *Mayor of New York v. New England Transfer Co., supra,* where it was found that the trips of the railroad ferry "are dependent upon the arrival of through railroad trains."

The evidence in the court below consisted of all of the proceedings, including the testimony taken, before the Interstate Commerce Commission. Upon such a record the lower court found that the "finding of facts * * * sufficiently shows present or future public convenience and necessity" and that "the finding on which the order is based is supported by substantial evidence, and does not exceed the Commission's statutory powers."

The Court, in so holding, must necessarily have determined either (1) that there was substantial evidence showing a public need for a railroad ferry, or (2) that evidence of necessity for a general ferry alone was sufficient to support the certificate.

If the Court's conclusion was that there was substantial or sufficient evidence to show any need for a railroad ferry, it is submitted, upon the foregoing, that there is no substantial showing of any need whatsoever for a railroad ferry.

If the Court's conclusion was that a showing of necessity for a general ferry was sufficient to support the certificate then also the Court was in error.

It is, therefore, submitted that the lower court erred in finding that the evidence supported the certificate.

IV.

WHERE THERE IS NO EVIDENCE OR NO SUBSTANTIAL EVIDENCE TO SUPPORT A NECESSARY FINDING, THE CERTIFICATE IS VOID.

It has been seen above that there was no evidence before the Commission or the court below to support the finding on which the certificate was based. In such a case the certificate is void and must be set aside.

Thus, in *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91, this Court said:

> "In the comparatively few cases in which such questions have arisen it has been distinctively recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing numerous authorities) or if the facts do not, as a matter of law, support the order made (citing authorities)."

In *Skinner and Eddy Corp. v. United States, et al.*, 63 L. ed. 772, 249 U. S. 557, the Court said in referring to an order of the Interstate Commerce Commission:

> "The finding (of the Commission) thereon would have been conclusive, *unless there was lack of substantial evidence.*" (Parenthesis and italics ours.)

In *B. and O., etc., et al. v. United States, et al.*, (Chicago Junction case) 264 U. S. 258, 68 L. ed. 667, this Court said:

> "The privilege for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

In *Tagg Brothers v. U. S., etc.*, 280 U. S. 420, 442, it was said:

> "It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law, Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42; *or is based upon a finding made without evidence*, Chicago Junc-

tion Case, 264 U. S. 258, 263; *or upon evidence which clearly does not support it,* Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547; New England Divisions Case, 261 U. S. 184, 203; Colorado v. U. S., 271 U. S. 153, 166, *the order must be set aside.*" (Italics ours.)

The law upon this point is so clear that it is unnecessary to elaborate the argument. Indeed, the Court below held that:

> "If it is true that the Commission is without power to make the order, it would follow necessarily, we think, that this Court would have jurisdiction, at the suit of a *proper party,* to enjoin its enforcement."

But

> "The finding on which the order is based is supported by substantial evidence and does not exceed the Commission's statutory powers."

Whether or not appellant was a "proper party," the Court did not determine, as hereinbefore pointed out.

It is submitted, however, at this point, that, there being no evidence to support the finding upon which the certificate was based, the certificate was void and should be set aside.

V.

THE RAILROAD HAS NO AUTHORITY, UNDER THE PROVISIONS OF ITS CHARTER, TO ENGAGE IN A GENERAL FERRY BUSINESS.

The railroad's charter contains authority for the company to

> "run and employ steamboats or other vessels to connect said railroad or railroads with other points by water communication;" (R., pp. 48; 163).

It is on this grant of power that the company relies for authority to engage in a general ferry business. But, in construing such language, the courts have repeatedly held that where railroads are given power to use boats to connect the railroad with other points, such boats cannot be operated as general or unlimited ferries. And such has been the ruling, even where the language went beyond that used in the applicant's charter and specifically authorized the railroads to locate and construct the railroad lines over and across ferries.

In Connecticut a railroad was enjoined from using its ferry boats for purposes other than that of transporting passengers and freight of the railroad, the Court saying:

> "They (petitioner's counsel) insist that the respondents' charter nowhere contains a grant of a *general, unlimited* ferry; or such a franchise as justifies them in carrying passengers between the two places above named, except as the passage is connected with a further use of the railroad. It is certain that ferries, like all public franchises, are subject to the pleasure and control of the legislature. The legislature alone can create them, and it must therefore be conceded that the respondents have no right to a general ferry, unless such a ferry is granted to them in their charter. We see no such grant. They obtained none by virtue of the charter of the New London and Stonington Railroad Company; on the contrary, the 8th section of that charter expressly restricts the right of ferriage to what is necessary 'for carrying the passengers and freight of said railroad to and from the same.' When afterwards, in 1856, the rights, franchises and duties of the New London and Stonington Railroad Company became invested in these respondents, under a charter consolidating that company with the New Haven and New London Railroad Company, we should have been surprised to

find that the legislature had thereby converted what was a limited ferry under the grant to the New London and Stonington Railroad Company, into a general unlimited ferry for the consolidated company. The legislature might have done so, it is true, as it had the power, but we should not under the circumstances have expected it, and we may well be jealous of that construction of the consolidated charter which the respondents say gives them an enlarged or general ferry. We believe nothing of the kind was contemplated by the legislature; nor will we impute such intention to the persons who procured the passage of the act.

"But the language of the consolidated charter is too plain to admit of any serious difficulty or doubt in its construction. The 5th section of this charter when fairly considered, can be construed to mean nothing more than what is expressed in the earlier charter, for it declares that the ferry shall be 'a part of the railroad or route,' to connect the road on the east side of the harbor with that on the west side. If then it is a part of the new continuous railroad, it is not and cannot be a general or unlimited ferry. The two are absolutely inconsistent. If the ferry be a general one, it ought to be accessible at all times by all people, with such vehicles and freight as are carried over ordinary ferries for a fixed toll, besides being subject to a ferry commissioner, as other ferries, and not to cease or expire whenever the railroad itself ceases. Now nothing like this is the case with this ferry, which is a mere link or connection between the two railroads. And further, if a ferry granted like this in connection with a railroad is to be worth anything to the railroad company, it must be exclusively appropriated to the use of the company, and be wholly under their control—that is, it must be a railroad and nothing more; not a common highway or bridge over a river or harbor."

Fitch v. New Haven, supra.

And in a Federal case in Massachusetts it was held that charter authority to maintain a ferry for railroad purposes is not to be understood as authorizing a railroad to take toll for all travel, and for purposes in nowise connected with the railroad. The Court said:

> "It has been contended, that this ferry was, in truth, kept by the Eastern Railroad Company, and that they are authorized to maintain it by the first section of their charter. Its language is as follows: 'And said corporation is hereby authorized and empowered to locate, construct; and finally complete a railroad from the city of Boston to the boundary line between the commonwealth of Massachusetts and the state of New Hampshire; on or near the line next hereinafter described, beginning at or near the land or wharf of the Lewis Wharf Company; thence by steamboats, or other boats, over and across the ferry, to East Boston, so called; thence,' &c., locating the road to the boundary of the commonwealth. This is merely descriptive of the line of the road. It was to run from a point at or near Lewis' Wharf, over and across the ferry to East Boston. The ferry is mentioned only to designate the route over which the corporation were to pass by steamboats, or other boats, for the purposes of a railroad. It certainly is not to be understood that this railroad corporation was authorized to establish and maintain a ferry and take toll for all travel, and for purposes in nowise connected with their road. The route of the road passes over the Merrimack River, and across the site of a bridge. Could the corporation, there, establish a general toll bridge, independent of the railroad? But further, this charter was granted on the 14th day of April, 1836. The ferry had been established, and Sumner, White and Oliver appointed ferrymen, in 1832. The second section of the charter declares, that 'nothing herein contained shall be construed to confirm, interrupt or impair, the existing rights of any corporation, person or persons, owning or interested in any ferry already established or

licensed.' This removes all pretense for saying, that the pre-existing ferry was intended to be merged in the railroad. It is preserved distinct and independent, and in nowise to be interrupted or impaired.

"I am constrained, therefore, to say, that neither under the license to Sumner, White and Oliver, nor under the charter of the Eastern Railroad, do the claimants derive any legal right to maintain this ferry; and that in doing so they are contravening the express provisions of the statute."

The Maverick, supra.

In a Virginia case, it was pointed out that charter of a railroad company, giving the company the right to convey, *inter alia,* passengers and vehicles across the body of water known as Hampton Roads, did not authorize the operation of a general ferry. The Court said:

"While it is true that the bill of complaint alleges that the Norfolk, Willoughby Spit and Old Point Railroad Company was empowered 'to charge and collect reasonable tolls, rates, and charges for its services in that regard,' it is nowhere explicitly alleged that a schedule of rates or tolls was ever promulgated for the operation of the ferry, separate and apart from the operation of the railroad. Courts, in construing an act of the legislature, must gather the legislative intent from the act as a whole. Thus construing the act incorporating the Norfolk, Willoughby Spit & Old Point Railroad Company, we are of opinion that it was the intention of the legislature to confer upon the company the right only to convey and transport passengers, teams, vehicles, freight, and other things across Hampton Roads by means of boats in connection with its railroad business, and not separate and apart therefrom. In other words, the act under review is a charter of incorporation of a railway, and was never intended to confer upon the appellant the exclusive right to operate a ferry be-

tween Willoughby Spit, in the city of Norfolk, and the military reservation of the United States Government at Old Point.

"The first and second sections of the act, instead of endowing the company with dual franchises, to wit, a railroad and a ferry franchise, are descriptive merely of the route of the railroad.

"In 25 C. J., par. 3, p. 1052, it is said:

" 'An express power to establish a ferry to effectuate other powers granted, does not confer a right to establish a ferry independent of the exercise of such powers.'

"In Darnell v. State, 3 S. W. 365, 48 Ark. 321, it is held:

" 'A right conferred by charter to build a toll road and to establish a ferry as an incident to the road is not a right to establish and maintain a public ferry independent of the road.'

"See 2 Farnham on Water and Water Rights, p. 1228.

"There is nothing in the bill to indicate that the boats operated by the appellant ran at periods other than such periods as connected its boats with the cars of its lessor, the Virginia Railway and Power Company.

"A ferry, both in common and legal parlance, is but the continuation of a highway from one side of the water over which it passes to the other side, or but the substitute for the ordinary bridge, and is for the accommodation of the public generally. New York v. New England Transfer Company, 14 Blatchf. 159, Fed. Cas. No. 10,197 (C. C.). Had the ferry in question been operated for the benefit of the public in general instead of being operated as a substitute for a railroad bridge we are inclined to the view that this fact would have been set forth in the bill in clear and unmistakable language. With the exception of

the use of the word 'ferry' in section 2 of the Act of incorporation, it does not appear anywhere in the act. On the other hand, the act fairly bristles with reference to the powers and limitations of the railroad company."

Ches. Ferry Co. v. Hampton Roads Transp. Co., supra.

VI.

UNLESS THE CERTIFICATE IS SET ASIDE, APPELLANT WILL SUFFER GREAT AND IRREPARABLE DAMAGE.

It seems to be undisputed in the record that, if the proposed ferry is established, appellant will suffer great and perhaps irreparable legal damage. Because of this self-evident fact, it was permitted to intervene in the proceedings before the Interstate Commerce Commission.

The record shows that the history of ferry companies operating over Chesapeake Bay has been one of financial disaster. In order to maintain such a service, the State of Maryland agreed to pay an annual subsidy to appellant. After some years of unprofitable operation, appellant, in the years 1928 and 1929, was able to earn substantial profits. In 1928, its gross revenues were $310,979.92 (R., p. 199) and its net income $130,550.59 (R., p. 31). In 1929 its gross was $359,509.18 (R., p. 201) and its net $125,869.59 (R., p. 31).

The railroad's estimates of ferry revenue were based upon a traffic count of motor vehicles at Claiborne. The railroad assumed that 32 per cent. of the vehicles at Claiborne, a terminus of the appellant, would be diverted to the proposed service offered by the railroad (R., p. 23). If this estimate is sound, the appellant will be ruined. It was pointed out to the Commission, that the estimates of revenue presented by the Railroad were faulty, in that all the vehicles at Claiborne did not cross

the bay (R., p. 24), and that if the Railroad could get 32 per cent. of the appellant's business, it would ruin the appellant without obtaining enough to justify its own operation. The Commission admitted that this argument was "pertinent," but undertook to accept the Railroad's estimates anyhow, because the Railroad said the estimates "represent its best judgment in the matter" (R., p. 24).

According to the Railroad's testimony before the Commission, if it is permitted to establish its proposed competing ferry, that ferry will absorb gross revenues from the traffic now available to appellant in the amount of $365,000.00 for the first year and in increasing amounts for each succeeding year. If the railway company's actual ferry revenues be only one-half of its estimated ones, it is apparent that appellant will suffer an annual operating loss from and after the establishment of the proposed ferry and will soon go the way of all its predecessors. Moreover, the record is clear that not only will the proposed ferry bring about the financial collapse of appellant's company, but that both ferries will, in the process, be completely wrecked.

It is, therefore, submitted that, if the proposed ferry is established, appellant will suffer great and perhaps irretrievable damage.

VII.

IT APPEARING THAT THE CERTIFICATE IS VOID AND THAT UNLESS THE SAME BE SET ASIDE, APPELLANT WILL SUFFER GREAT AND IRREPARABLE LEGAL DAMAGE, APPELLANT IS ENTITLED TO INSTITUTE AND MAINTAIN THIS ACTION.

If it be determined, upon the foregoing situations, that the Commission's certificate is void and that, unless the same be set aside, appellant will suffer great legal dam-

age, then it appears to be certain that appellant has the right to institute and maintain this action.

Section 212 of the Judicial Code, (originally the Commerce Court Act, June 18, 1910, Chap. 309, 36 Stat. at L., 542, Comp. Stat., Sec. 1005) provides:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

While this provision seems clearly to authorize appellant to maintain the case at bar, appellees urged below two grounds upon which they contended that appellant could not maintain the action:

a. That the statute just quoted permitted appellant to *intervene* in a proceeding to set aside an order of the Commission, but that it did not authorize it to *institute* any such proceeding; and

b. That, even if appellant might *institute* such a proceeding, appellant was not a proper party to maintain the action because it did not have a sufficient legal interest in the subject matter.

(a) Upon the first proposition, a sufficient answer is the language of this Court in *Baltimore and Ohio Railroad Company, et al. vs. United States, et al.*, (Chicago Junction Case) 264 U. S. 258, 68 L. ed. 667, in which a similar contention was apparently made. There, this Court said:

> "The plaintiffs may challenge the order because they are parties to it. The Judicial Code, Section

212, (originally the Commerce Court Act (June 18, 1910, Chap. 309, 36 Stat. A. L. 542, Comp. Stat. Sec. 1005)) declares that any party to a proceeding before the Commission may, as of right, become a party to, 'any suit wherein is involved the validity of such order.' The section does not in terms provide that such party may *institute a suit* to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest." (Italics ours.)

(b) Upon appellees' second contention, the lower court said:

> "If it is true that the Commission is without power to make the order, it would follow necessarily, we think, that this Court would have jurisdiction, *at the suit of a proper party,* to enjoin its enforcement, but we need not stop here to inquire whether the ferry company is such a party since we are of the opinion that the Commission had jurisdiction and that the finding on which the order is based is supported by substantial evidence, and does not exceed the Commission's statutory power." (Italics ours.)

Had the lower court found the certificate void, it is impossible, of course, to say what its decision may have been as to appellant's right to maintain this action. It would be strange indeed, however, if, upon a showing that the Commission had promulgated a void order and that its action, unless enjoined, would result in the destruction of appellant's property rights, no Court would have jurisdiction to grant relief. It must undoubtedly be true that some person under such circumstances could invoke the aid of the judicial branch of the government. The lower court held, as above set out, that such a suit could undoubtedly be maintained by a "proper party."

The question now to be determined is whether or not appellant is the "proper party" to maintain it. That it is, seems to be settled by clear and convincing authority. *Skinner and Eddy Corp. v. U. S., et al.*, 63 L. ed. 772, 249 U. S. 557; *Baltimore and Ohio, etc., et al. v. U. S., et al.*, (Chicago Junction case), 264 U. S. 258, 68 L. ed. 667; *Chesapeake and Ohio Ry. Co. v. U. S.*, 75 L. ed. 824, 283 U. S. 35; *Anchor Coal Co. v. U. S.*, 25 Fed. (2nd) 462, 478; *Cleveland, etc. Ry. Co. v. Jackson*, 22 Fed. (2nd) 509.

Skinner and Eddy Corp. v. United States was an action by a shipper to set aside an order of the Interstate Commerce Commission, increasing certain rates on steel from Pittsburgh to Seattle. The Transportation Act prohibited increasing such rates where the same had been once reduced, except upon proving the existence of certain economic conditions other than the elimination of water competition. It appears in this case that the statutory condition precedent to the issuance of the Commission's order had not been met and that the order was therefore void as having been issued in violation of the statute. The Court, in holding that appellant had the right to maintain this action, said:

> "The defendants contend that the district court did not have jurisdiction of the subject matter of this suit * * *. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory the remedy must have been sought primarily by proceedings before the Commission (citing cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law (citing cases). But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discrim-

inatory, or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

In *B. & O. v. United States* it appeared that the New York Central Railway had secured an order from the Interstate Commerce Commission permitting it to acquire control of two switching roads in the Chicago terminal area. Defendants contended, as in the case at bar, that plaintiffs *did not have sufficient legal interest* to entitle them to maintain an original suit to set aside the Commission's order. It appeared that the order of the Commission was discriminatory and thus in violation of the Transportation Act. In sustaining appellant's right to maintain the suit, the Court said:

"Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs.

"Second, The defendants contend that the plaintiffs have not the legal interest necessary to entitle them to challenge the order. That they have, in fact, a vital interest is admitted. * * *"

"If * * * a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here."

"This loss is not the incident of more effective competition. * * * It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper."

C. & O. R. Co. v. United States. Although the basis of the complaint in this case was mere loss of a competitive advantage, and while it was apparently conceded that the order of the Commission was valid, nevertheless the court did not even consider the jurisdictional question in the case at bar.

The Anchor Coal Company case, as also the Chicago Junction case, supra, was heard by a three-judge court in a suit to set aside an order of the Interstate Commerce Commission. In sustaining complainant's right to maintain the action, the court said:

"Having reached the conclusion that in entering the order complained of the Commission exceeded its powers and proceeded upon erroneous principles of law, the question which presents itself is whether this court has power to grant relief. We think that it has. Suit is instituted by coal producers who are vitally affected by the rates. Some of them were residents of the Southern District of West Virginia, and were heard before the Commission in the proceeding in which the order complained of was entered, and, although not originally parties to the proceeding, they became parties by intervention and were heard as such. We think that the court has jurisdiction under U. S. C. Tit. 29, Secs. 46 and 47, (28 U. S. C. A., Secs. 46, 47). Chicago Junction case, 264 U. S. 258, 267, 44 S. Ct. 317, 68 L. Ed. 667. And, although we do not understand that question is

raised as to venue, but merely as to jurisdiction, we think that the venue is good under U. S. C. Tit. 28, Sec. 43 (28 U. S. C. A., Sec. 43). Skinner v. Eddy Corp. v. U. S., 249 U. S. 557, 39 S. Ct. 375, 63 L. Ed. 772."

The court's attention is invited to the fact that this case was reversed by the Supreme Court in a memorandum opinion, but upon the sole ground that the question presented to the court had then become moot. 279 U. S. 812, 73 L. Ed. 971.

See also:

Cleveland etc. Ry. v. Jackson, 22 Fed. (2d) 509.

It is submitted that the foregoing cases clearly support the proposition that where the order of the Interstate Commerce Commission is void and where the complainant has been allowed to intervene before the Commission because of financial interest, or where it can otherwise show a financial interest, complainant has a legal right to maintain such a suit as the one at bar.

See also:

Western Pacific California R. R. Co. v. Southern Pacific Co., (decided November 23, 1931), not yet reported.

Appellees maintain, however, that this is not true and in support of their contention that appellant cannot maintain this action relied below on the four cases which will now be analyzed.

(a) *Sprunt & Son v. U. S.*, 281 U. S. 249, 74 L. Ed. 832. In this case it appears that the Interstate Commerce Commission had adjusted certain rates on cotton for domestic and export shipments. Appellant, a shipper, who suf-

fered a competitive disadvantage by reason of such adjustment in rates, brought this suit to set aside the Commission's order. *No complaint was made that the order was invalid* for want of statutory authority in the Commission to make it, but the complaint was based solely upon the fact that the adjustment resulted in financial loss to complainant. The court, after stating that if the rates were unreasonable, appellant might complain to the Interstate Commerce Commission in an administrative proceeding, held that the action could not be maintained by appellant because it was "not subjected to, or threatened with, any legal wrong."

(b) *Pittsburgh & West Virginia Ry. Co. v. United States, et al.*, 281 U. S. 479, 74 L. Ed. 980. In this case it appears that the Wheeling & Lake Erie Railway, of which the Pittsburgh & West Virginia was a minority stockholder, had secured a certificate of public convenience to abandon its railway station in Cleveland terminal. The Pittsburgh claimed that if the order were permitted to stand the financial stability of the Wheeling would be jeopardized and that it in turn, as a stockholder, would suffer financial injury. No complaint was made that the Interstate Commerce Commission lacked statutory authority to issue the order complained against. In denying the Pittsburgh's right to maintain the action, the court said:

> "The claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order."

(c) *Pennsylvania Co. v. United States, et al.*, 40 Fed. (2d) 921. The Pennsylvania brought this suit to set

aside an order authorizing the extension of a competing line into territory in which the Pennsylvania had theretofore had a practical monopoly. The only basis for the suit, as pointed out by the court, was the loss of a competitive advantage. *No complaint was made that the order of the Commission lacked statutory authority* and the suit was therefore dismissed upon the ground that the Pennsylvania did not have sufficient legal interest to maintain it.

* * * * * *

It is readily apparent from the foregoing brief review of these three cases that in none of them was it contended that the order of the Interstate Commerce Commission complained of *was invalid or exceeded the authority conferred by statute upon the Commission.* In each case the action was based upon the single claim *that an order, the validity of which was not questioned,* would result in financial damage to complainant.

* * * * * *

(d) *Edward Hines Yellow Pine Trustees, et al., v. United States, et al.,* 263 U. S. 143, 68 L. Ed. 216. This case was one wherein plaintiffs, even assuming the order of the Commission to be void, (which was not decided) had not suffered, and were not threatened with any loss or injury whatever. On the contrary, their sole complaint was that the Commission's order removed from their competitors the burden of a penalty, the continuance of which would give plaintiffs a preferential status.

There is not the slightest conflict between the foregoing authorities relied upon respectively by appellant and appellees. The rule clearly deducible from all of them is plain and may be stated as follows:

(a) That, where the Commission's order is valid but will result in financial loss to the complainant, no action

can be maintained; (*Sprunt & Son v. U. S.; Pittsburgh & West Virginia Ry. Co. v. U. S.; Pennsylvania Co. v. U. S., supra*).

(b) That, where the order is void but no legal damage will result to complainant, no action can be maintained (*Hines, etc., v. U. S., supra*); but

(c) That, where the order is void and complainant will suffer financial loss therefrom, an action can be maintained. (*Skinner & Eddy Corp. v. U. S.; Baltimore & Ohio Ry. Co. v. U. S.; Chesapeake & Ohio Ry. Co. v. U. S.; Anchor Coal Co. v. U. S., supra*).

It is submitted that the certificate here involved was void; that, unless the same be set aside, the financial ruin of appellant will ensue and that, therefore, appellant can, as a matter of right, maintain this suit.

CONCLUSION.

From what has been said above, it must be apparent to this Court that the Railway Company, under the pretense of extending its line, is seeking to establish a general ferry between two points entirely within the State of Maryland and having no real connection or use whatsoever with its railway business.

The railroad proposes to build, for this pretended extension of its railroad line, two ferry vessels, at a cost of $350,000 each, a total of $700,000 (R., p. 20). These vessels are to be designed to carry 95 motor vehicles and 1,800 passengers (R., p. 20), although its passenger revenues have been decreasing year by year (R., p. 19), and, until it reduced its maintenance expenditures in 1929, it did not earn operating expenses from passenger and freight revenue combined. It cannot be seriously con-

tended, or contended at all, that vessels of such size are needed to extend the railroad line; or that the ferriage of motor vehicles and occupants of motor vehicles has any relationship to the railroad. With total revenues from passengers and freight in 1929 of $118,146 (R., p. 19), the railroad proposes to expend $1,085,442 for an "extension" of its line.

Having defaulted in interest and principal payments on its bonded indebtedness of $1,000,000, it now seeks to substitute a $600,000 second mortgage for its existing obligation, and to issue new first mortgage bonds for $750,000, a total indebtedness of $1,350,000, and then to issue $525,000 of equipment trust certificates, in order to engage in this ferry venture.

It is certain that, if denied authority to operate a general ferry, the railroad is not interested in making these expenditures, incurring these obligations and extending its line for its railroad business.

Its obvious purpose is to evade the jurisdiction of the Maryland Public Service Commission. The Interstate Commerce Commission, in turn, has seen fit, it is believed, to transcend not only the plain provision of Section 1, Par. 3, but also that of Section 1, Par. 2, of the Transportation Act.

In its report, on which the order complained of was based, the Commission referred to the alleged extension of the railroad only incidentally, and devoted practically all of its discussion to the convenience or need of a general ferry across Chesapeake Bay from Chesapeake Beach to Trippe's Bay.

Whether or not such a ferry is necessary for the convenience of the public is purely a matter for determina-

tion by the State of Maryland, through its agencies constituted for that purpose. The Interstate Commerce Commission has manifold duties to perform within its sphere and should, especially under existing conditions, be slow to encroach upon a jurisdiction denied it by the statute, if not by the Constitution as well.

It seems clear from record that, even assuming power in the Interstate Commerce Commission to usurp the functions of the Maryland Public Service Commission, the railroad failed to show the existence of an "urgent public need" for the establishment of a general ferry at the points designated in the application. Lacking anything but the assurance of patronage from those few especially advantaged, the railroad submits estimates which do not bear analysis, and which are admittedly nothing but guesses. For instance, the railroad finds from the State Roads Commission of Maryland an average of 780 vehicles each day at Claiborne, Maryland, the eastern terminal of the Claiborne-Annapolis Ferry Company. Because Claiborne is 15 miles from any other town, the railroad *assumes* that *all* of this traffic is ferry traffic.

The railroad further *assumes* that 32 per cent. of this traffic would originate at or be destined for points south of the Choptank River, and, after making these two assumptions, applicant estimates that, in the first year of operation it would carry an average of 250 motor vehicles per day, or 91,250 per year, across Chesapeake Bay.

The fact is, however, that *all* of the vehicles at Claiborne do not cross Chesapeake Bay, and not even a substantial part of them make the trip. The Claiborne-Annapolis Ferry Company offers facilities (three boats) to

carry to and from Claiborne across Chesapeake Bay 216,445 motor vehicles (R., p. 117), and yet in the year 1929 actually carried but 76,352 (R., p. 114) and p. 117), motor vehicles. This is at the rate of 209 motor vehicles per day. So of the average of 780 motor vehicles at Claiborne per day *only 209 of that number actually crossed Chesapeake Bay* (R., p. 117). The railroad forgets or ignores the fact that of the average of 780 motor vehicles per day at Claiborne, many are there simply to meet passengers on the ferry and others to bring passengers to the ferry. To assume that 250 of 780 will cross the Bay at Trippe's Bay, is to assume that *all* of the existing traffic, and some new traffic, will depart from Claiborne entirely and concentrate at railroad's terminal in Dorchester County. The fallacy of any such assumption is plain. The railroad was unable to give a satisfactory analysis of its estimate that 32 per cent. of the traffic at Claiborne—or approximately one-third—came from, or was destined for, points below the Choptank River. But if we accept that percentage, although the railroad admitted that it had no real basis for the estimate, and apply it to the traffic *actually carried* across Chesapeake Bay in the best year of business the Claiborne-Annapolis Ferry Company ever had—with three boats available—we find that the railroad's estimate is 32% of 76,352 or 24,432. At $3.00 per car, this will produce an annual revenue from automobiles of $73,296. In 1929, the appellant carried 260,950 passengers (R., p. 117), and 32% of that number is 83,504. At 50 cents each, a passenger revenue of $41,752 is estimated. The total estimated revenues on this basis will be $115,048 for the first year of operation. This is on the assumption that the railroad will get 32% of the traffic now carried by the appellant, although we do not believe that any such result is possible, or that the railroad's ferry busi-

ness, with all new trade that could be fairly assumed, will reach anything like the figure of $115,048.

The railroad, as has been pointed out estimates expenses and charges for the first year of ferry operation of $247,-567, excluding depreciation, etc. To meet these costs the railroad will have but $115,048, applying its percentage to traffic *actually known to cross the Bay* (in 1929). The deficit for the first year, excluding depreciation, etc., would be $132,519.

The State of Maryland has a vital interest in its local highways; the Interstate Commerce Commission, in this proceeding at least, has manifested no such concern. The concluding paragraphs of its report evince, in our opinion, such a callous disregard of local welfare that it is quoted as follows with our own underscoring:

> "It is concluded from the record that, *assuming that both the Annapolis Ferry and the proposed ferry may survive,* the applicant's proposal herein will be in the public interest. Failure of the project would result in no worse transportation conditions than now obtain *unless, perchance, the intervenor's ability to perform service* meanwhile were seriously impaired. The time within which a volume of traffic sufficient to support the new venture may materialize is problematical, but it would seem that there is *at least the* possibility that a remunerative traffic eventually may be developed" (R., p. 31).

Upon the whole case, it is submitted:

1. That the Interstate Commerce Commission's certificate pretends to grant authority to establish a general ferry service, from point to point within the State of Maryland, and is, therefore, null and void.

2. That the Commission's certificate cannot be construed merely as authority to extend the railroad line for railroad purposes.

3. That even if so construed, there is no evidence, or no substantial evidence, of any present or future public convenience to be served by the extension of the railroad line by ferry, and that the Court below erred in finding substantial or sufficient evidence to support the Commission's finding and the certificate based thereon.

4. That the appellant has the right to maintain this action.

5. That the Court below erred in dismissing the bill and in refusing to grant the relief prayed for.

Wherefore, it is respectfully submitted that the decision and decree below should be reversed.

Respectfully,

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